the education of her children, and she and her husband knew that the land when subdivided as housing lots would fetch a higher value. The idea of the Sino-Malay approach to the whole project originated from the appellant to ensure speed and success of the application. The promised transfer of the half share to the appellant, though constituted the substance of the argeement, was contingent upon approval of the application before the deadline. The transfer was meant to be the reward for the appellant if the condition had been fulfilled. It was upon these circumstances that the parties entered into the 1975 agreement. In our judgment the express intention of the parties to make the deadline a "contingent" condition was made crystal clear in clause 4(1) which not only provided December 31, 1977 as the specified date within which the approval of the State Government was to be obtained but also provided that failure to fulfil the condition would render the whole agreement "null and void and of no further force or effect and neither party shall have any claim against the other in connection with this Agreement".

Though the word "condition" or "conditional" or "contingent" was not used in the agreement, on the true construction of the document we held that the learned Judge did not err in law or in fact in concluding the 1975 agreement to be a conditional contract or to be technically exact a contingent contract as defined in our Contracts Act, 1950. Since the deadline for performance of the contingent condition had been fixed then fulfilment of the obligation on or before December 31, 1977 must be strictly adhered to and the time should not be extended by reference to equitable principles (see *Aberfoyle Plantations Ltd.* v. *Khaw Bian Cheng*).[2] In our judgment this was a case where time was not merely of the essence of the contract but fulfilment of the promise by the appellant to obtain the approval on or before December 31, 1977 was a condition precedent of the whole contract. As such section 56 of the Contracts Act did not apply and the proper provision should be section 36(1) which provides:–

"Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time become void if, at the expiration of the time fixed, the event has not happened, or if, before the time fixed, the event becomes impossible."

In the present appeal the uncertain event was the approval for subdivision by the State authority. The respondent promised to transfer her half-share in the land to the appellant if the approval was obtained within two years of the agreement. The event had not happened by the deadline and therefore under section 36(1) the contract became void. The dismissal of the appellant's claim for specific performance was accordingly correct in law.

Order accordingly.

Solicitors: *Mahadevi Ganeshmurugan & Co.; Allen & Gledhill.*

PUBLIC PROSECUTOR v. SEERALAN

[S.C. (Salleh Abas L.P., Wan Suleiman & Syed Agil Barakbah S.C. JJ.) January 14, 29 & March 30, 1985] [Kuala Lumpur – Federal Court Criminal Application No. 21 of 1984]

Criminal Law and Procedure – Inquest – Counsel holding watching brief – Contempt of Court – Allegation that Magistrate was unfair and prejudiced – Refusal to leave court – Case dealt with by Magistrate – Criminal Procedure Code (F.M.S. Cap. 6), ss.128, 353 & 359 – Subordinate Courts Act, 1948. Third Schedule, para. 26.

Legal Profession – Counsel holding watching brief – Contempt of court.

In this case the Magistrate at Seremban was holding an inquest. The respondent Mr. Seeralan, a member of the Bar was in court holding a watching brief. In the course of the proceedings the respondent became emotional and made several allegations of bias against the Magistrate. The Magistrate ordered the respondent to leave the court but the respondent refused to comply. He continued to make allegations of bias against the Bench saying the Bench was unfair and prejudiced. The Magistrate eventually, after an adjournment, invoked paragraph 26 of the Third Schedule of the Subordinate Courts Act, 1948, took cognizance of the contempt committed by the respondent and required him to show cause why he should not be punished. The respondent denied the charge and claimed to be tried before another Magistrate. The Magistrate then fined him $150/– or in default one week's imprisonment. The next day the High Court exercising its powers of revision reversed and set aside the Magistrate's Order. The revisionary proceedings were held in the Chambers of the Judge in the presence of the Magistrate and counsel for the respondent. The Public Prosecutor subsequently referred three questions of law to the Supreme Court. These were –

(1) Whether or not in law criminal contempt has been committed in the face of the court by the respondent by accusing the presiding Magistrate in Port Dickson Magistrate's Court Inquest No. 47/1984 of being biased, unfair and prejudiced and by refusing to leave the court when ordered to do so by the learned Magistrate.

(2) If the answer to question (1) is in the affirmative, then whether it is right in law for the learned magistrate in the circumstances of this case to exercise his power of punishment for contempt of court summarily.

(3) If the answer to question (2) is in the affirmative, then whether it is right in law for the learned Judge to set aside the Order of the learned magistrate committing the respondent for contempt of court in chambers without giving due notice or the right to be heard to the Public Prosecutor?

Held: (1) the record clearly revealed the uncompromising attitude of the respondent and his unabashed arrogance and insolence towards the Magistrate. His continued accusations that the court was biased, unfair and prejudiced clearly amounted to a contempt of court. Such conduct and behaviour were not just disorderly acts nor a mere use of unbecoming language. They constituted a contempt of court of a serious kind, without any mitigating factor;

(2) in this case the record clearly showed that the elements of contempt were fully set out and the respondent was asked to show cause. There was therefore no failure of the court to give the respondent an opportunity to be heard before he was punished;

(3) the learned Magistrate in this case had a choice of either proceeding under para 26 of the Third Schedule of the Subordinate Courts Act, 1948 or of authorising a prosecution;

(4) the absence of a provision in the Subordinate Court Rules regarding the exercise of the power by the Magistrate does not mean that the power cannot be exercised. The Magistrate can effectively exercise the power so long as the contemnor is given an opportunity of being heard;

(5) in the circumstances the order of the learned Judge of the High Court should be quashed and the order of the learned Magistrate restored.

Cases referred to:

(1) *Re Kumaraendran* [1975] 2 M.L.J. 45.
(2) *Reece* v. *Mc Kenna, Ex Parte Reece* [1953] Q.S.R. 258, 264.
(3) *Maharaj* v. *A.G. for Trinidad and Tobago* [1977] 1 All E.R. 411.
(4) *Qureshi* v. *Qureshi* [1971] 2 W.L.R. 518, 535.
(5) *Public Prosecutor* v. *Lee Ah Keh & Ors.* [1968] 1 M.L.J. 22, 24.

SUPREME COURT.

Fong Seng Yee (Deputy Public Prosecutor) for the applicant.

N. Ramachandran for the respondent.

Param Cumaraswamy holding watching brief for the Bar Council.

Cur. Adv. Vult.

Salleh Abas L.P. (delivering the Judgment of the Court): This Reference first came before us on January 7, 1985 but the hearing was postponed because of the absence of the respondent and his counsel. In the meantime, Mr. Param Cumaraswamy on behalf of the Bar Council made an application to us to allow him to address us on the questions raised in the Reference after the parties have completed their submission. We granted this application. Now, the facts are as follows:

On November 7, 1984 the Magistrate, Port Dickson, Mr. N. Rajendran, was holding an Inquest (Inquest No. 47/1984). The respondent Mr. Seeralan, a member of the Bar was in court holding a watching brief and conducting the inquest was Prosecuting Officer, Inspector Arvinder Singh.

During the course of the inquest, witness No. 8 became unduly difficult, whereupon Inspector Arvinder Singh informed the court that he wished to bring to the attention of the witness the provisions of section 193 of the Penal Code, presumably in order to impress upon the witness the importance of speaking the truth.

At this juncture, the respondent stood up and without asking the permission of the court objected to the course which the Prosecuting Officer intended to take and accused him and the Bench of unnecessarily tormenting the witness. He was reminded by the magistrate that he had no right to address the court unless permitted to do so; whereupon, the respondent became emotional and made several allegations of bias against the magistrate. In order to continue the proceedings, the magistrate ordered the respondent to leave the court, but he refused to comply with the order saying that he had every right to be in court. He continued to make allegations of bias against the Bench saying that the Bench was unfair and prejudiced against the witness, and that he would apply to have another magistrate to hear the inquest.

As a result of this the Magistrate told the respondent that he was in contempt and informed the Prosecuting Officer that the respondent was then under arrest and was to be moved out from the court. When the respondent refused to leave the court, and said that he had to be carried away, the court adjourned. Anyhow, on being informed by the Prosecuting Officer that the respondent was leaving for lunch and would be back at 2.00 p.m., the magistrate agreed and allowed the respondent to leave for lunch.

When the court reassembled after lunch, the magistrate invoked para 26 of the Third Schedule of the Subordinate Courts Act 1948 and said that he took cognizance of the contempt committed by the respondent and informed him of his acts and statements which, in the opinion of the magistrate, constituted a contempt and required him to show cause why he should not be punished. The acts and

statements were:

(1) as he was only holding a watching brief in the matter, the respondent had to ask the court's permission before addressing it, and he had not done so;

(2) he accused the Bench of being unfair and biased against witness No. 8;

(3) he refused to leave the court when ordered to do so;

(4) by his continued unbecoming behaviour the respondent had disrupted the court's proceedings.

He denied the charge and claimed to be tried before another magistrate because the magistrate being himself, the complainant was therefore biased. As a result of that response the magistrate then fined the respondent of $150/- or in default one week's imprisonment. The respondent refused to pay the fine.

The next day, November 8, 1984, Peh Swee Chin J. of the Seremban High Court exercising his powers of revision reversed and set aside the magistrate's order. The revisionary proceedings were held in his chambers in the presence of the magistrate and Mr. Ramachandran. The Deputy Public Prosecutor was not notified of the revision nor asked to be present at the revision proceedings although this officer was on that morning in court waiting for the hearing of a number of criminal appeals.

The Public Prosecutor now refers three questions to us which, in his opinion, are questions of law of public interest. These are:-

(1) Whether or not in law criminal contempt has been committed in the face of the court by the respondent by accusing the presiding magistrate in Port Dickson Magistrate's Court Inquest No. 47/1984 of being biased, unfair and prejudiced and by refusing to leave the court when ordered to do so by the learned magistrate;

(2) If the answer to question (1) is in the affirmative, then whether it is right in law for the learned magistrate in the circumstances of this case to exercise his power of punishment for contempt of court summarily.

(3) If the answer to question (2) is in the affirmative, then whether it is right in law for the learned Judge to set aside the Order of the learned magistrate committing the respondent for contempt of court in chambers without giving due notice or the right to be heard to the Public Prosecutor?

The First question:

Did the conduct and behaviour of the respondent constitute a contempt of court? We agree with Mr. Param Cumaraswamy that merely to address the court without getting its permission did not constitute a contempt, especially when the respondent in this case had the court's indulgence to cross-examine practically every witness. The records show that he had cross-examined the first five witnesses, and refrained from so doing only as regards witnesses Nos. 6 and 7.

An inquest is not like a trial. There are no parties to prosecute and to defend. It is only an inquiry by a magistrate as to the cause of death and the prosecuting officer is there not to prosecute anyone but only to assist the court with the examination of witnesses for the purpose of giving evidence. A defence counsel present at an inquest is not there to defend anyone, but only to look after the interests of those who engage him. Whilst he has no right to speak as of right, this right seldom becomes an issue because the court normally gives such indulgence whenever it is asked. However, although addressing the court without permission is not a contempt it is certainly not polite to do so without permission. In polite circles such as the legal profession, this simple etiquette is expected.

The gravity of the respondent's conduct lies in his continued accusations that the court was "biased, unfair and prejudiced" against witness No. 8. This witness, as observed by the court, was untruthful as she kept on giving evasive answers to straightforward questions. No one would doubt the propriety of Inspector Arvinder Singh's application to treat the witness as hostile and impeach her credit. Whilst the respondent's objection to the proposed course of action in order to protect the witness may not amount to a contempt, having been reminded that he had no right to make such objection as of right, he should not have made the situation more difficult by an allegation of bias against the court. There is absolutely no justification for him to make the accusation. Whilst we accept that counsel can plead for his client without fear and favour, he certainly has no right to abuse the court and interupt the proceedings. An allega-

tion of bias, in our opinion, is not just a mere act of discourtesy, but a contempt of court. (*Re Kumaraendran,*[1] and *Reece* v. *McKenna, ex parte Reece,* [2] cited in *Borrie and Lowe's* Law of Contempt, second edition, p. 30).

Mr. Param Cumaraswamy submitted that as the magistrate did not record the actual words spoken by the respondent, but only the substance of what he said, the respondent therefore could not be guilty of contempt. With respect, we have difficulty in accepting this submission especially when Mr. Param Cumaraswamy conceded that he did not challenge the accuracy and the *bona fides* of the record taken down by the magistrate. Section 268 of the Criminal Procedure Code does not require evidence to be taken in the form of questions and answers, but in the form of a narrative. This has been the law and the practice in this country for a long time. Unless the record taken down by the magistrate is impugned, there is no way in which we could doubt the actual words uttered by the respondent. We can only go by the record.

The submission is an attempt to bring the case under reference within the scope of the Privy Council's decision in *Maharaj* v. *A.G. for Trinidad and Tobago.*[3] In that case their Lordships held that an allegation that a judge is guilty of "unjudicial conduct" is not a contempt of court. The trial judge took the allegation to be a "vicious attack on the integrity of the court", but their Lordships were satisfied that there had been no such attack, and allowed the appellant's appeal against his conviction. What *Maharaj's* case established is that the phrase "unjudicial conduct" does not amount to a vicious attack on the integrity of the Court. In any event, what vitiated the committal for contempt was the failure of the trial judge to make plain to the appellant the specific nature of the contempt with which he was being charged. Reverting to the case under reference, the words uttered by the respondent are not "unjudicial conduct", but "biased, unfair and prejudiced" and, therefore, in our opinion, constitutes a contempt of court.

Now, what does the record disclose? In our view, the record clearly reveals the uncompromising attitude of the respondent and his unabashed arrogance and insolence towards the magistrate. His continued accusations that the court was biased, unfair and prejudiced clearly amount to a contempt of court. This contempt had become all the more serious by his defiant attitude towards the court. When asked to leave the court, he refused, and when told that he was under arrest, he replied that he had to be carried away. The record shows that this abusive conduct had in fact interrupted the inquest proceedings which the Court should be concerned with and which, therefore, had to be postponed to another date (November 18, 1984). Under such circumstances what else could the magistrate do in order to restore the dignity of the court and bring order to it? We are of the view that it was correct and proper for him to invoke para 26 of the Third Schedule to the Subordinate Courts Act to deal with the situation. But this legitimate step was only met by continued defiance of the respondent who kept on repeating the same allegations of bias against the magistrate, saying that he would show cause only before another magistrate. He showed absolutely no remorse or regret over what had happened.

In our view, such conduct and behaviour was not just a disorderly act, nor a mere use of unbecoming language. They constituted a contempt of court of a serious kind, *i.e.* without any mitigating factor.

The second question:

Many cases of contempt of court have been reversed because of the failure of the court to give the contemnor an opportunity of being heard before he is punished, *Re Kumaraendran (supra),* and *Maharaj* v. *A.G. for Trinidad and Tobago (supra).* In the case under reference the record clearly shows that the elements of contempt were fully set out and that the contemnor was asked to show cause. He did not attempt to reply to the charge but instead demanded that another magistrate should hear it. Now, because his demand was not acceded to, his counsel Mr. Ramachandran submitted that the magistrate had no power to deal with the matter.

This submission is based on the consideration that the contempt in this case is also an offence under section 228 of the Penal Code; it being an offence of intentional insult or interruption to a magistrate sitting in a judicial proceeding. Under section 128(ii) of the Criminal Procedure Code the magistrate who takes cognizance of an offence upon his own knowledge of suspicion cannot try the offender if the latter objects to the case being tried by him. In that event, the case should be either tried by another magistrate or be committed for trial before the High Court. Thus, since the respondent objected to be tried by the same magistrate, the subsequent contempt proceed-

ings must be held to be null and void. Further, although under section 353 of the Criminal Procedure Code any offence under various sections of the Penal Code could be taken cognizance of and proceeded with by the magistrate in whose view or in whose presence the offence was committed, nevertheless under section 359 of the Criminal Procedure Code the same magistrate cannot try it. So goes the submission on behalf of the respondent.

The answer to this submission is that the learned magistrate did not act under section 353 of the Criminal Procedure Code. Even if he had done so and despite the fact that the procedure under this section is by way of analogy applicable to the power exercisable under para 26 of the Third Schedule of the Subordinate Courts Act, we cannot accept the submission. Both sections 128 and 359 of the Criminal Procedure Code do not affect the operation of section 353. It is clear from the provision of section 128 itself that this section is made "subject to the provisions of this Code", and surely section 353 is one of the provisions of the Code to which section 128 is subject. Further, section 359 clearly excludes section 353 from its ambit by the phrase "Except as provided in sections 353 and 357 ..." used in the section (section 359 itself).

In support of Mr. Ramachandran's submission, Mr. Param Cumaraswamy urged us to hold that once the respondent had required the contempt of court to be dealt with by another magistrate, the request should be granted; otherwise all subsequent proceedings would be held to be null and void. He quoted no authority. With respect, we cannot infer such a construction in para 26 of the Third Schedule to the Subordinate Courts Act. If such a construction had been intended the legislature would have said so and would not have empowered the same magistrate cognizance of any contempt of court and to award punishment therefor. In our view, therefore, the fact that the contempt may also amount to an offence under section 228 of the Penal Code does not in any way deprive the magistrate of the power to punish for contempt. In this situation, the magistrate has a choice of either proceeding under para 26 of the Third Schedule to the Act or of authorizing a prosecution. This is clear from the last sentence of para 26 itself, which says "If the contempt of court is punishable as an offence under the Penal Code, the court may, in lieu of taking cognizance thereof, authorize the prosecution".

There is one other matter which needs to be mentioned here. The magistrate's power under para 26 of the Third Schedule of the Subordinate Courts Act to take cognizance of any contempt of court and to award punishment for the same is exercisable to "such extent and in such manner as may be prescribed by rules of court". Order XXXVIII rule 1 of the Subordinate Courts Rules 1950 made provisions for the exercise of this power and Abdoolcader J. (as he then was) held in *Re Kumaraendran (supra)* that the rule applied to a contempt of court committed in the face of the court in respect of proceedings of a civil nature as well as or at best by analogy to those of a criminal nature because the rule is "a statutory crystallisation of an established principle of law". However, when the Subordinate Courts Rules 1980 came into effect replacing the 1950 Rules, the provisions of Order XXXVIII rule 1 of the 1950 Rules were not retained. There is, therefore, no provision in the present Subordinate Courts Rules regarding the exercise of this power by the magistrate either in respect of civil proceedings or criminal proceedings. In our view the absence of such provision in the rules of court does not mean that the power cannot be exercised. The magistrate can effectively exercise the power so long as the contemnor is given an opportunity of being heard. For this purpose we refer to the principle enunciated by Sir Jocelyn Simon P. in *Qureshi* v. *Qureshi* [4] where he said:

> "... where a legislative authority by an enactment setting up a tribunal or other body envisages rules to be made governing the procedure of such tribunal or body, and no such rules are made, the tribunal or body is not necessarily thereby disabled from performing its function. In such case the tribunal or body acts effectively provided it acts in accordance with natural justice and to promote the objective with which it was set up, and possibly by analogy with the rules of procedure prescribed for comparable tribunals or bodies."

In this context the guideline provided for by Ali J. (as he then was) in *Public Prosecutor* v.*Lee Ah Keh & Ors.* [5] still stands.

The third question:

We do not think that it is necessary for us to deal with this question in view of our conclusions on questions 1 and 2.

We therefore reply to the three questions raised in this Reference as follows:

Questions 1 & 2:

The answers are in the affirmative.

Question 3:

No answer is necessary.

We, therefore, for the reasons given quash the learned judge's order and restore the magistrate's order.

Order accordingly.

Solicitors: *N. Ramachandran & Co.*

FOO LOKE YING & ANOR. v. TELEVISION BROADCASTS LTD. & ORS.

[S.C. (Abdul Hamid C.J. (Malaya), Hashim Yeop A. Sani and Abdoolcader S.C. JJ.) May 17 & 23, 1985]

[Kuala Lumpur – Supreme Court Civil Appeal No. 133 of 1985]

Copyright – Cinematograph films made in Hongkong – Whether video tapes come within definition of cinematograph films – Publication in Malaysia – Whether copyright acquired in respect of cinematograph films – Copyright Act, 1969, ss 2, 3, 4, 5, 6, 12 & 20.

Interpretation – Statutes – Purposive and literal interpretation – Where literal meaning is clear and reflects the purposes of the enactment – Whether marginal note can be referred to – Whether explanatory statement can be referred to – International Conventions or treaties.

The first respondent, a limited company incorporated in Hongkong, are the makers and owners of the copyright in certain cinematograph films in Hongkong, and the second and third respondents are respectively the licensee and sublicensee in Malaysia. The films were video recordings to be shown on television screens for which purpose they were copied on to tapes for sale and hire as video cassettes. The films were published in Malaysia within thirty days of their first publication in Hongkong. The appellants in a representative action suing on behalf of themselves and other members of the Perak Video Tape Dealers Association issued a writ seeking a declaration that the first respondent is not entitled to copyright in Malaysia in respect of the cinematograph films produced by them in Hongkong and consequential injunctive relief and damage. George J. dismissed the appellants' claim and they appealed against the decision.

Held: (1) video-tape comes within the definition of "cinematograph film" in section 2(1) of the Cinematograph Films Act, 1969. The definition of "cinematograph film" makes no reference to cinematography or any other process but concentrates chiefly on the essential characteristic of a sequence of visual images capable of being shown as a moving picture;

(2) the marginal note to section 5 of the Copyright Act, 1969, reads "Copyright by virtue of citizenship or residence" and that to section 6 "Copyright by reference to country of origin". It is therefore abundantly clear that they are distinct provisions to be read separately and operating independently of each other;

(3) the provisions of the Act under consideration call for a purposive and literal construction which is one that follows the literal meaning of the enactment where that meaning is in accordance with the legislative purpose and applies where the literal meaning is clear and reflects the purposes of the enactment. There is no justification or warrant to read the provisions of sections 5 and 6 together so as to restrict the application of section 6 only to works eligible for copyright as specified therein of which the author is a qualified person as defined in section 5;

(4) there is no ambiguity in section 2(2) of the Act and on the provisions of the Act as they now stand "any country" must necessarily mean Malaysia and would include any other qualifying country to which the Act is extended under the provisions of any regulations if and when made under section 20. In this case there was publication in Hong Kong in the first instance and upon publication in Malaysia within a period of thirty days of the earlier publication in Hongkong within the intendment of section 2(2) (c), the provisions of section 6(1) (a) of the Act would operate to confer copyright on the films in question. The first respondent as the author is accordingly vested under section 12 of the Act with copyright in respect thereof.

Cases referred to:

(1) *R.* v. *Commisssioners of Income Tax* (1888) 22 Q.B.D. 296.
(2) *R.* v. *Ramsgate (Inhabitants)* (1827) 6 B. & C. 712, 715; 108 E.R. 613.
(3) *Warwick Film Productions Ltd.* v. *Eisinger* [1969] 1 Ch. 508, 521.
(4) *Ellerman Lines Ltd.* v. *Murray* [1931] A.C. 126.
(5) *Salomon* v. *Commissioners of Customs & Excise* [1967] 2 Q.B. 116.
(6) *Escoigne Properties Ltd.* v. *I.R.C.* [1958] A.C. 549, 566.
(7) *Becke* v. *Smith* (1836) 2 M. & W. 191, 195; 150 E.R. 724.
(8) *Asia Television Ltd. & Anor.* v. *Mega Video Recording Supply Centre* [1985] 1 M.L.J. 250.
(9) *Foo Loke Ying & Anor* v. *Television Broadcasts Ltd. & Ors.* Ipoh Civil Suit No. 1631 of 1984, unreported.
(10) *Lee Yee Seng & Ors.* v. *Golden Star Video Bhd.* [1981] 2 M.L.J. 43.
(11) *Television Broadcasts & Ors.* v. *Seremban Video Centre Sdn. Bhd.* [1985] 1 M.L.J. 171.
(12) *Bushell* v. *Hammond* [1904] 2 K.B. 563.
(13) *Reg* v. *Schildkamp* [1971] A.C. 1.
(14) *Quebec Railway, Light, Heat and Power Co. Ltd.* v. *Vandry* [1920] A.C. 662.
(15) *Enmore Estates Ltd.* v. *Darsan* [1970] A.C. 497, 506.
(16) *Asia Television Ltd. & Anor.* v. *Viwa Video Sdn. Bhd.* [1984] 2 M.L.J. 304.
(17) *South West Water Authority* v. *Rumble's* [1985] 2 W.L.R. 405, 411.